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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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WILLIE MAURICE HERVEY, JR., Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from the Fifth Court of Appeals, No. 05-17-00823-CR
89th District Court, Wichita County, Cause No. 57,785-C

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Willie Maurice Hervey, Jr.

* The trial judge was Hon. Charles M. Barnard, Presiding Judge, 89th Judicial District Court, Wichita County, Texas.

* Counsel for Appellant at trial were Rebecca Ruddy and David Bost, Wichita County Public Defender's Office, 600 Scott Street, Suite 204, Wichita Falls, Texas 76301.

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* Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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3. Alternatively, should a voluntary-act instruction resemble the instruction in *Simpkins v. State*, 590 S.W.2d 129 (Tex. Crim. App. [Panel Op.] 1979), and specify the facts that would render the defendant's conduct involuntary or inform the jury that voluntariness is distinct from the culpable mental state?

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* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The court of appeals reversed this conviction based on how the trial court charged the jury on voluntary act. It should have considered whether a voluntariness instruction ever belonged in the charge. Because Texas law requires only that conduct *include* a voluntary act, Appellant's last act before the gun discharged did not have to be voluntary. His earlier volitional acts of drawing a loaded gun and pointing it at the neck of his adversary (facts that were part of the version of events

most favorable to the defense) sufficed. Regardless, the instruction actually given was not harmful and, more likely, benefitted him.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was not granted.

STATEMENT OF THE CASE

Appellant was indicted for murder.[1] The trial court rejected Appellant's voluntary-act-instruction proposals but included its own charge.[2] The jury convicted Appellant of murder and assessed a 70-year prison term.[3] The court of appeals held that the trial court's instruction was inadequate and reversed Appellant's conviction.[4]

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[1] CR 14.

[2] CR 344-45 (requested instructions), 358-60 (charge given); 13 RR 149-52 (conference).

[3] CR 368.

[4] *Hervey v. State*, No. 05-17-00823-CR, 2019 WL 3729505 (Tex. App.—Dallas Aug. 8, 2019, pet. granted) (not designated for publication).

GROUNDS FOR REVIEW

1. Does a trial court's *sua sponte* submission of an issue in the jury charge prevent a court of appeals from considering whether the evidence raised such an issue?

2. If, under a defensive view of the evidence, the defendant in a murder case drew, pointed, and wrestled over the gun of his own volition, is he nonetheless entitled to a voluntary-act instruction if testimony shows that another person's conduct precipitated the gun's discharge?

3. Alternatively, should a voluntary-act instruction resemble the instruction in *Simpkins v. State*, 590 S.W.2d 129 (Tex. Crim. App. [Panel Op.] 1979), and specify the facts that would render the defendant's conduct involuntary or inform the jury that voluntariness is distinct from the culpable mental state?

4. Alternatively, does an instruction result in some harm to the defense if it lacks this specificity and is missing from lesser-included-offense instructions never reached by the jury?

STATEMENT OF FACTS

The State's theory of the case was that instead of bringing money to a marijuana deal, Appellant brought his loaded gun to rob the dealer, Mark Hawkins.[5] Based on the bullet's trajectory and the medical examiner's testimony, the State

[5] 14 RR 35-40.

argued Appellant intentionally pointed the gun at Hawkins and fired while they were standing some distance apart and Hawkins had his hands up.[6] The indictment alleged two murder theories: (1) intentionally or knowingly causing Hawkins's death, and (2) intending to cause serious bodily injury and committing an act clearly dangerous to human life that caused Hawkins's death.[7]

The defensive-instruction-friendly version of events (Appellant's) had the two men fighting over control of the gun inside Appellant's car. Appellant testified he was being shorted in the deal when he pulled a loaded gun to "scare [Hawkins] out of [appellant's] car."[8] He testified he held the gun to Hawkins's neck, pushed him towards the car door, and told him to get out.[9] Hawkins grabbed the gun.[10] The two struggled over it, and as Hawkins pulled on the gun, Appellant was "pulling back just . . . trying to keep it in my possession and I guess my finger slipped inside . . .

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[6] 14 RR 64-76.

[7] CR 14; TEX. PENAL CODE § 19.02(b)(1), (2).

[8] 13 RR 29-30.

[9] 13 RR 30, 31.

[10] 13 RR 31.

the trigger guard. That's when the gun goes off."[11] Hawkins was shot a single time and died as a result. In his testimony, Appellant denied he intended to kill or cause serious bodily injury.[12]

At the charge conference, the parties discussed an instruction on voluntary act. It is not clear who was responsible for its initial inclusion in the draft the State brought to the charge conference, but it appeared to be the same as in the final version.[13] In the abstract and application, the voluntary-act instruction told the jury:

> For the offense of murder, you are instructed that a person commits an offense only if he voluntarily engages in conduct, including an act, omission, or possession. Conduct is not rendered involuntary merely because the person did not intend the results of his conduct.
>
> . . . . [application paragraphs to return a guilty verdict for murder]
>
> But if you do not so believe, or if you have a reasonable doubt thereof, or if you have a reasonable doubt that the shooting was not the voluntary act or conduct of the defendant, you will acquit the defendant and next consider whether the defendant is guilty of the offense of manslaughter.[14]

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[11] 13 RR 31, 33-34.

[12] 13 RR 18-19.

[13] 13 RR 136-37; 13 RR 151 (describing first instruction as Paragraph 16, as it was numbered in the final version).

[14] CR 358-59.

The charge also included criminally negligent homicide as a lesser.[15] Appellant wanted a more specific voluntary-act instruction. He submitted two proposals.[16] The first, which parroted the *Simpkins v. State*[17] instruction, would have told the jury to acquit if they believed "the shooting was the result of an accidental discharge of the gun while . . . Hawkins and the defendant were struggling or scuffling for possession of the gun and was not a voluntary act or conduct of the defendant."[18] The other was similar to the State Bar pattern instruction.[19] It defined when an act was voluntary and when it was not and told jurors: "The requirement that the act constituting the offense be voluntary is separate and distinct from the requirement that the defendant have acted with one or more culpable mental states."[20] Additionally, Appellant

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[15] CR 359-60.

[16] CR 344-45.

[17] 590 S.W.2d 129, 135 (Tex. Crim. App. [Panel Op.] 1979).

[18] 13 RR 149-52; CR 344. Alternatively, he proposed that the charge reference the evidence at issue by saying, "You have heard evidence that, when the defendant pulled the trigger, his act was not voluntary because his act in pulling the trigger was caused by [the victim] pulling on the gun. . . . . If you have a reasonable doubt as to the defendant's conduct being voluntary you will say so by a verdict of 'Not Guilty.'" CR 345.

[19] CPJC 21.6 "Instruction—Lack of Voluntary Act," TEXAS CRIMINAL PATTERN JURY CHARGES: CRIMINAL DEFENSES (State Bar of Texas 2015).

[20] *Id.*

wanted the instruction applied to the lesser-included offenses.[21] The trial court overruled his requests.[22]

The court of appeals reversed Appellant's murder conviction because the voluntary-act instruction failed to (1) specify the involuntary act that, if true, would result in an acquittal; (2) incorporate the instruction to the lesser-included offenses; and (3) instruct the jury that voluntariness is separate from a finding of a culpable mental state.[23] It denied without opinion the State Prosecuting Attorney's motion for rehearing that no voluntary-act instruction was warranted.

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[21] 13 RR 152-54.

[22] 13 RR 154.

[23] *Hervey*, 2019 WL 3729505, at *10-11.

SUMMARY OF THE ARGUMENT

To meet Texas's "voluntary act" requirement, a defendant's conduct need only *include* a voluntary act. While the court of appeals was wrong about the inadequacy of instruction actually given, more fundamentally, its primary error was to hold it did not need to consider whether the evidence raised the issue. Appellant's last act before the gun discharged in a struggle did not have to be voluntary, given his other volitional acts that preceded it.

ARGUMENT

ISSUE 1

Does a trial court's *sua sponte* submission of an issue in the jury charge prevent a court of appeals from considering whether the evidence raised such an issue?

The court of appeals insisted that the issue in the case was not "whether appellant was entitled to a charge on voluntariness-of-conduct."[24] It should have been. Complaints about instructions not raised by the evidence don't matter.[25] The court did not explain why the issue of entitlement was off the table—other than to point out that the State did not challenge entitlement at trial or on appeal and the trial court submitted it *sua sponte*.[26] To the extent these were the reasons, they are wrong.

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[24] *Id.* at *5.

[25] *See, e.g.*, *Hughes v. State*, 897 S.W.2d 285, 301 (Tex. Crim. App. 1994) (any error in mitigating evidence instruction was harmless because defendant was not entitled to it and thus could not have contributed to the jury's answers to the special issues).

[26] *Hervey*, 2019 WL 3729505, at *5 ("Nor is the issue whether appellant was entitled to a charge on voluntariness-of-conduct; the State did not argue at trial, and does not argue on appeal, that appellant was not entitled to that charge.…").

***Sua sponte* submission may not make an issue "law applicable to the case" if there is no evidence raising the issue.**

The court of appeals appears to have believed entitlement was not an issue because the trial court had *sua sponte* submitted voluntariness in the charge. The opinion includes a multi-paragraph explanation of cases that considered the phrasing of particular instructions (as the court of appeals was to do later in its opinion) because they had been given *sua sponte*.[27] This explanation was odd in context because no one was suggesting Appellant forfeited a defensive instruction by not requesting one.[28] Also, the court concluded, "Here, the trial court, sua sponte, gave some instructions on voluntariness of conduct. That defense became law applicable to the case. It was therefore incumbent on the trial court to properly charge the jury on that defense."[29] Later, the court held that the trial court had a duty to provide an

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[27] *Id*. at *6 (citing *Mendez v. State*, 545 S.W.3d 548 (Tex. Crim. App. 2018)).

[28] *Hervey*, at *6-7. The State's forfeiture argument in the court of appeals was that Appellant's trial objection did not comport with his appellate argument. State's CoA Brief at 16-17 (available online http://www.search.txcourts.gov/Case.aspx?cn=05-17-00823-CR&coa=coa05). Regardless, the court of appeals does not couch its sua-sponte-submission-becomes-law-applicable-to-the-case section as a response to the State's appellate argument; instead it is placed under the section heading "Requirement of a Charge on a Defensive Issue."

[29] *Id*. at *7 (citing *Mendez*, 545 S.W.3d at 553).

adequate voluntary-act charge "because voluntariness-of-conduct was raised as an issue."[30] Unless this was a conclusory statement the court of appeals reached without any mention of the evidence that raised it,[31] it appears that the trial court's *sua sponte* submission of voluntariness was behind the court of appeals's decision not to consider entitlement.

To the extent this is so, it was error because it confuses preservation and entitlement. Usually, a defensive instruction must be requested or it won't be "law applicable to the case."[32] But a request is unnecessary when the trial court gives the instruction *sua sponte*, and an appellant may complain on appeal about any shortcomings with the given instruction.[33] This rule is sometimes shorthanded to

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[30] *Id.* at *9.

[31] The court acknowledged multiple times that entitlement to a defensive instruction requires evidence raising the issue, so it knew this is ordinarily the law. *Id.* at * 6 ("A defendant is entitled to a jury instruction on a defensive issue if that issue is raised by the evidence..."), *7 ("Voluntariness… is a defensive issue which must be raised by the evidence…).

[32] TEX. CODE CRIM. PROC. art. 36.14; *Posey v. State*, 966 S.W.2d 57 (Tex. Crim. App. 1998).

[33] *Barrera v. State*, 982 S.W.2d 415, 416 (Tex. Crim. App. 1998); *see also Hall v. State*, 225 S.W.3d 524, 538 (Tex. Crim. App. 2007) (Keller, P.J., dissenting) ("[T]he defendant can rely upon the trial court's submission to substitute for his own expressed desire for a defensive issue to be part of the case. It would make no sense to require a defendant to

"'when a trial judge instructs on a defensive issue,' on his own motion, 'he must do so correctly.'"[34] This rule gets a defendant over the preservation hurdle to making a defensive issue "law applicable to the case."

But that's all it does. It does nothing to avoid the foundational requirement that jury instructions be raised by the evidence.[35] The court of appeals's apparent conclusion—that a trial court's submission of a defensive instruction removed the need to address entitlement (regardless of the evidence)—flouts this basic requirement and would give defendants a windfall. It would invite verdict

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request an instruction that is already in the jury charge.").

[34] *Mendez*, 545 S.W.3d at 553 (citing *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013)). An appellant will still have to meet *Almanza*'s more demanding "egregious harm" standard for errors in the *sua sponte* instruction to which he did not object. *Id.*

[35] There are clearly two requirements: a request (or sua sponte submission making a request unnecessary) and evidence raising the issue. *See Rogers v. State*, 105 S.W.3d 630, 639 (Tex. Crim. App. 2003) ("A defendant is entitled, upon a timely request, to an instruction on any defensive issue raised by the evidence, provided that: 1) the defendant timely requests an instruction on that specific theory; and 2) the evidence raises that issue."); *Booth v. State*, 679 S.W.2d 498, 500 (Tex. Crim. App. 1984) ("when properly requested, the trial court must instruct the jury on every defensive theory raised by the evidence or testimony"). Voluntariness is no different than other defensive issues. While Penal Code § 6.01(a) provides for an actus reus in every crime, voluntariness must still be raised by the evidence to warrant submission of the issue to the jury. *See Ramirez-Memije v. State*, 444 S.W.3d 624, 628 (Tex. Crim. App. 2014); *Farmer v. State*, 411 S.W.3d 901, 906 (Tex. Crim. App. 2013).

irrationality by making the issue of entitlement immune to appellate review when there had been *sua sponte* submission.

As the winning party, the State could not forfeit consideration of entitlement.

The State's failure to challenge entitlement either at trial or on appeal also appears to be behind the court's refusal to consider entitlement. It notes this fact immediately after declaring entitlement not the issue.[36] This was error. At the trial level, prosecutors are often advised not to object to requests for defenses and "just let them have it" either to avoid having to respond to the issue later on appeal or because the jury is likely to reject the defense anyhow.[37] This no more forfeits or waives error than a defendant's blessing of the charge prevents complaint on appeal.

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[36] *Hervey*, 2019 WL 3729505, at *5 ("Nor is the issue whether appellant was entitled to a charge on voluntariness-of-conduct; the State did not argue at trial, and does not argue on appeal, that appellant was entitled to that charge …").

[37] *See, generally*, *Madden v. State*, 242 S.W.3d 504, 517 (Tex. Crim. App. 2007) ("Of course, a trial judge might err on the side of caution and submit a jury instruction even when the disputed fact does not appear to be outcome-determinative, because appellate courts might disagree on the legal question of sufficient facts to support reasonable suspicion.").

And on appeal, "[b]ecause the State prevailed at trial, it was not required to raise any allegations before the court of appeals."[38] It was not required to file a brief at all.[39]

ISSUE 2

> If, under a defensive view of the evidence, the defendant in a murder case drew, pointed, and wrestled over the gun of his own volition, is he nonetheless entitled to a voluntary-act instruction if testimony shows that another person's conduct precipitated the gun's discharge?

Had the court of appeals properly considered entitlement either on its own or after the SPA's motion for rehearing, the only proper course would have been to hold that the evidence did not raise the issue. But it is evident the court of appeals misunderstands the voluntary-act requirement since the instruction they countenance requires the jury to acquit if they find "the shooting was caused by the independent

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[38] *Volosen v. State*, 227 S.W.3d 77, 80 (Tex. Crim. App. 2007); *see also McClintock v. State*, 444 S.W.3d 15, 20 (Tex. Crim. App. 2014) ("[T]he State, as the prevailing party at trial, need not raise a particular argument in favor of the trial court's ruling in a reply brief on appeal as a predicate to later raising it in a discretionary review context.").

[39] *Volosen*, 227 S.W.3d at 80 (citing TEX. R. APP. P. 38.8, which outlines procedures only where an *appellant* fails to file a brief).

act of [the victim] pulling on the gun and thereby causing appellant's finger to pull the trigger."[40]

There's no requirement that the last act be voluntary.

Texas's voluntary-act statute, which is modeled on the Model Penal Code,[41] provides that, for criminal liability, the defendant's conduct must *include* a voluntary act; it need not consist solely of voluntary acts. The provision reads: "[a] person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession."[42] This requirement of a voluntary act is a longstanding feature of criminal law. It is likely based on the idea that it is not fitting to punish someone for an action beyond his control and that "the law cannot hope to deter."[43] A quintessential example is committing an offense while sleepwalking. But while a voluntary act is a requirement for criminal liability, "it does not follow that every act

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[40] *Hervey*, 2019 WL 3729505, at *9.

[41] *Rogers*, 105 S.W.3d at 637.

[42] TEX. PENAL CODE § 6.01(a).

[43] *Rogers*, 105 S.W.3d at 637 n.14 (citing Model Penal Code Commentary).

up to the moment that the harm is caused must be voluntary."[44] Under the Model Penal Code, voluntary acts that precede an involuntary one are sufficient:

> When an agent performs a voluntary act, intending, knowing, or consciously disregarding the risk that it will cause him to perform a subsequent nonvoluntary criminal act, we are far more likely to allow liability because the criminal act was under the control of the agent. It is reasonable to expect him to refrain from performing the prior voluntary act that caused him to perform the subsequent nonvoluntary criminal act—and to punish him if he fails to refrain.[45]

Thus, nonvolitional conduct "preceded by voluntary action may lead to liability based upon the earlier conduct."[46] For example, an epileptic defendant who fails to take his medicine and decides to drive a car cannot avoid liability for criminally negligent homicide when he loses consciousness at the time he struck and killed someone; his voluntary act of driving the car is enough.[47]

As early as 1984, in *George v. State*, this Court construed § 6.01(a)

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[44] Wayne R. LaFave and Austin W. Scott, Jr., SUBSTANTIVE CRIMINAL LAW at 199 (2d ed. 1986) (interpreting MODEL PENAL CODE § 2.01).

[45] Douglas Husak, "Rethinking the Act Requirement," 28 CARDOZO L. REV. 2437, 2457 (May 2007).

[46] *Rogers*, 105 S.W.3d at 638.

[47] *See, e.g.*, *People v. Decina*, 138 N.E.2d 799, 804 (N.Y. 1956) (defendant with medical history of seizures criminally responsible for driving into group of school children, killing four).

consistently with the Model Penal Code, *i.e.*, that the defendant's conduct need only *include* a voluntary act.[48] *Farmer* is a more recent example. There, this Court held that a defendant who voluntarily picks up medication laid out for him, swallows it, and becomes intoxicated while driving is not entitled to a voluntary-act instruction in his DWI trial.[49] As *Farmer* reiterated:

> [B]efore criminal responsibility may be imposed, the actor's conduct must "include[ ] either a voluntary act or an omission when the defendant was capable of action." The operative word under Section 6.01(a), for present purposes, is "include." Both the Model Penal Code comments and the Practice Commentary to the 1974 Texas Penal Code stress that the "voluntary act" requirement does not necessarily go to the ultimate act (*e.g.*, pulling the trigger), but only that criminal responsibility for the harm must "include an act" that is voluntary (*e.g.*, pulling the gun, pointing the gun, or cocking the hammer). [50]

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[48] 681 S.W.2d 43, 45 (Tex. Crim. App. 1984). The Practice Commentary to the 1974 Penal Code understood § 6.01(a) to require "that conduct to support criminal responsibility must *include* a voluntary act or omission so that, for example, a drunk driver charged with involuntary manslaughter may not successfully defend with the argument he fell asleep before the collision since his conduct included the voluntary act of starting up and driving the car." Seth S. Searcy & James R. Patterson, TEX. PENAL CODE ANN. § 6.01 Practice Commentary, p. 80 (Vernon 1974) (emphasis in original).

[49] *Farmer*, 411 S.W.3d at 907.

[50] *Id.* at 905-06 (quoting *Rogers*, 105 S.W.3d at 638) ("All that is necessary to satisfy Section 6.01(a) of the Texas Penal Code is that the commission of the offense *included* a voluntary act.") (emphasis in original). Because the statute requires engaging in voluntary "conduct," which is defined as act or omission plus its accompanying mental state, TEX.

The volitional acts of drawing, pointing, and struggling over a loaded gun—all part of the defense view of the facts—eliminate voluntariness as an issue.

Some theoretical questions exist about how remote in time and place the volitional act can be on the causal chain leading to the offense and still satisfy § 6.01(a)'s single-voluntary-act requirement.[51] But when the offense involves shooting a gun, there are several micro-acts—drawing the gun, removing the safety or pulling back the hammer, pointing it at the victim, aiming, and pulling the trigger—any number of which will render a defendant's conduct sufficiently voluntary. *George* held that it was "of little moment" whether the precise bodily movement that released the handgun's hammer was the defendant's voluntary act where all the evidence showed that his other acts leading to the actual shooting (drawing revolver, pulling hammer back, and pointing it at friend's face) were

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PENAL CODE § 1.07(a)(10), it may require one voluntary act be performed intentionally, knowingly, recklessly, or with criminal negligence.

[51] *See, e.g.*, Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C.L. REV. 1545, 1582 (2013) (describing *Martin v. State*, 17 So. 2d 427 (Ala. Ct. App. 1944), a public intoxication case where the defendant became intoxicated in his home and was forcibly carried into public by officers).

voluntary.[52] In contrast, *Garcia v. State* held that a voluntary-act instruction was warranted based on evidence that the defendant's only voluntary acts were in receiving a cocked gun and threatening to throw it in the canal before the gun owner pulled on the gun and it discharged.[53] Merely retrieving a handgun from a vehicle, as in *Simpkins*,[54] or raising it in the presence of other people, as in *Brown*,[55] present closer questions. Pointing a gun at someone inside a car and struggling over the gun's control does not.

The court of appeals may have gone astray, as other courts of appeals have, by reading *George* and *Brown* to say that a voluntariness question is raised whenever a third person precipitates the gun's discharge.[56] *George* stated:

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[52] *George*, 681 S.W.2d at 47.

[53] *See Garcia v. State*, 605 S.W.2d 565 (Tex. Crim. App. [Panel Op.] 1980).

[54] *Simpkins*, 590 S.W.2d at 132 (raises the jury issue).

[55] *Brown v. State*, 955 S.W.2d 276, 277 (Tex. Crim. App. 1997) (raises the jury issue).

[56] *George*, 681 S.W.2d at 47; *Brown*, 955 S.W.2d at 280. *See Angelo v. State*, 977 S.W.2d 169, 178 (Tex. App.—Austin, pet. ref'd) ("where the conduct of a third party is implicated, the charge on voluntariness may be required"); *Stevenson v. State*, 963 S.W.2d 801, 805 (Tex. App.—Fort Worth 1998, pet. ref'd) (interpreting *George* as creating an exception to general rule against instructing on voluntary-act for interference by another person); *Hayward v. State*, No. 14-02-00869-CR, 2003 WL 21782592, at *2 (Tex. App.—Houston [14th Dist.] July 31, 2003, no pet.) (not designated for publication) ("Where evidence of a struggle or 'evidence of a precipitating act of another' exists, however, a defensive

> Where the issue is whether an accused recklessly caused bodily injury by shooting with a gun and the evidence shows that the accused voluntarily engaged in conduct that includes, *inter alia*, one or more voluntary acts leading to the actual shooting, we hold as a matter of law . . . that when such conduct also includes a bodily movement of the accused sufficient for the gun to discharge a bullet, without more—*such as precipitation by another individual* as in *Garcia* and *Simpkins*—a jury need not be charged on the matter of whether the accused voluntarily engaged in the conduct with which he is charged.[57]

In *Brown*, this Court relied on this "precipitation by another individual" language to hold that the evidence in *Brown* raised voluntariness.[58] According to Brown's account, he was bumped from behind by another person while raising a gun, it discharged, and a bullet struck one of his companions.[59] It is doubtful that either *Brown* or *George* was meant to change the law that only a single-voluntary act is required. And this Court's more recent cases in *Rogers*, *Farmer*, and *Ramirez-Memije* establish that it has not.

Instead, it appears that *Garcia*, *Simpkins*, and *Brown* just recognize that an

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instruction is warranted.").

[57] *George*, 681 S.W.2d at 47 (citations omitted and emphasis added).

[58] *Brown*, 955 S.W.2d at 280.

[59] *Id.*

instruction may be warranted when there is no conduct sufficiently voluntary before the gun discharges. The defendants' conduct in those cases appear to only involve carrying, holding, or raising (but not aiming) a gun.[60] It is not simply involvement of another person at the last moment before discharge that will warrant an instruction; the other person's acts must eclipse anything the defendant did.

In contrast, in cases like the instant one, when a defendant draws a loaded gun and points it at another he has a dispute with, it should come as no surprise that a struggle may occur and the movement of his hand and fingers may no longer be entirely within his control. Because Appellant's conduct created that situation, it would be absurd to absolve him of criminal responsibility on a theory meant to protect the sleepwalker and others the "law cannot hope to deter."[61] Like the defendant who drives himself to the bar and has several drinks, Appellant performed the acts of drawing and pointing a loaded gun at Hawkins "intending, knowing, or consciously disregarding the risk that it will cause him to perform a subsequent

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[60] Presiding Judge Keller makes this distinction about *Brown* in this Court's unpublished decision in *Piper v. State*, No. PD-0712-18, 2019 WL 4315756, at *3, 5 (Tex. Crim. App. Sept. 11, 2019) (Keller, P.J., concurring) (not designated for publication).

[61] *Rogers*, 105 S.W.3d at 637 n.14 (citing Model Penal Code commentary).

nonvoluntary criminal act."[62] This Court should clarify that, properly understood, a voluntariness instruction should seldom be required and that it is certainly not required on these facts.

There was even less reason to apply the voluntary-act requirement to the lesser-included offenses.

The court of appeals erred to hold that the voluntary-act instruction, if applicable at all, should have been applied to the lesser-included offenses.[63] At least with murder, Appellant claimed an act that was nonvolitional: his finger slipping from its position on the trigger guard. But Appellant pointed to no evidence that the acts constituting manslaughter and criminally negligent homicide—*i.e.*, drawing, pointing, and struggling for control of the gun—were other than his own volitional acts.[64] Instead, he had a purpose for doing all of these actions.[65] While culpable mental state and voluntariness are, for the most part, conceptually distinct, acts

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[62] *Husak*, *supra* note 45.

[63] *Hervey*, 2019 WL 3729505, at *11.

[64] 13 RR 152 (asking defense what evidence raised issue as to the lessers).

[65] He drew the gun to scare the dealer. 13 RR 30. He pushed it to his neck to get him out of his car. 13 RR 30-31. He struggled with the gun to try to keep it in his possession. 13 RR 34. He claimed to have told the dealer as they struggled, "you're not fixing to get this gun from me." 13 RR 33.

intentionally performed (in absence of sleepwalking or hypnosis) are necessarily within one's control. The lack of intended result (Hawkins' death) raised the issue of lesser offenses, but that does not equate to accident or lack of voluntary act.[66] Voluntariness was not raised as to the lesser offenses, and the court of appeals erred to hold otherwise.

ISSUE 3

> Alternatively, should a voluntary-act instruction resemble the instruction in *Simpkins v. State*, 590 S.W.2d 129 (Tex. Crim. App. 1979), and specify the facts that would render the defendant's conduct involuntary or inform the jury that voluntariness is distinct from the culpable mental state?

If a charge on voluntariness was warranted, *Simpkins* should not be the model.

If this Court finds that the evidence warranted submission of a voluntariness charge, the court of appeals still erred in what it required the charge to say. The court of appeals asserted that there was little guidance on this issue.[67] This is probably

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[66] *See Williams v. State*, 630 S.W.2d 640, 644 (Tex. Crim. App. 1982) (distinguishing between absence of intent as to the resulting injuries and lack of voluntary conduct —what former law used to jumble together as "accident").

[67] *Hervey*, 2019 WL 3729505, at *7, 9.

true, but it should not have relied on this Court's 1979 decision in *Simpkins*.[68] The instruction given there said, in relevant part:

> [I]f you believe from the evidence beyond a reasonable doubt that on the occasion in question the defendant . . . did cause the death of [the victim] by shooting him with a gun, as alleged in the indictment, but you further believe from the evidence, or have a reasonable doubt thereof, that the shooting was the result of an accidental discharge of the gun while [the victim] and the defendant were struggling or scuffling for the possession of the gun and was not the voluntary act or conduct of the defendant, you will acquit the defendant and say by your verdict not guilty.[69]

Simpkins said this instruction "fairly and adequately presented the issue raised by the appellant's own testimony."[70] But the issue Simpkins complained of was the failure to give a complete charge on accident—something this Court was later to recognize did not survive the 1974 Penal Code.[71] Consequently, this statement from *Simpkins* cannot be read as approval for language for a voluntariness instruction.

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[68] *Id.* at *7-10 (citing *Simpkins*, 590 S.W.2d at 134-35).

[69] *Simpkins*, 590 S.W.2d at 135.

[70] 590 S.W.2d at 135.

[71] *Adanandus v. State*, 866 S.W.2d 210, 229 (Tex. Crim. App. 1993); *Williams*, 630 S.W.2d at 644 ("There is no law and defense of accident in the present penal code, and the bench and bar would be well advised to avoid the term 'accident' in connection with offenses defined by the present penal code.").

Furthermore, the *Simpkins* charge requires the jury to find *both* accident and that the defendant's conduct was not voluntary.[72] This was never the law.

The specificity the court of appeals requires would constitute an improper comment.

The court of appeals erred to insist that a voluntariness instruction, like the *Simpkins* instruction, should specifically set out the facts that, if true, would render the defendant's conduct involuntary.[73] This Court's more recent jurisprudence has not been as accepting of non-statutory instructions as *Simpkins* was.[74] It recently reiterated that "a trial judge should, as a general rule, avoid including non-statutory instructions in the charge because such instructions frequently constitute impermissible comments on the weight of the evidence."[75] The particulars of what

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[72] *Simpkins*, 590 S.W.2d at 135 (permitting acquittal if jury believed "the shooting was the result of an accidental discharge . . . and was not the voluntary act or conduct of the defendant."). Again, the former law on "accident" used to jumble together many concepts. *Williams*, 630 S.W.2d at 644.

[73] *Hervey*, 2019 WL 3729505, at *10 (explaining that a proper charge should "set out for the jury the nature of an involuntary act which, based on the facts of the case, the jury would need to find in order to acquit.").

[74] *Brown v. State*, 122 S.W.3d 794, 803 (Tex. Crim. App. 2003) (setting out improper judicial comment scale).

[75] *Beltran de la Torre v. State*, 583 S.W.3d 613, 617 (Tex. Crim. App. 2019).

the jury might find to be involuntary conduct would likely constitute an improper comment on the evidence and are best left to the parties to argue. Specifics are not required with other "voluntariness" jury questions,[76] and singling out such facts could convey, even obliquely, that the trial court believed these facts had been established or at least could invite the jury to pay them particular attention.[77] Here, the parties vigorously disputed whether there was a struggle.[78] Informing the jury that it could acquit if it believed the shooting resulted from an accidental discharge "while [the victim] and the defendant were struggling or scuffling for the possession of the gun," could be taken as weighing in on that disputed point.

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[76] Jury questions about the voluntariness of a confession under TEX. CODE CRIM. PROC. art. 38.22, §§ 6, 7, require general instructions rather than specific instructions that refer to the facts in evidence. *Oursbourn*, 259 S.W.3d at 176 (only an instruction under Art. 38.23 requires reference to specific facts). *See also Aranda v. State*, 506 S.W.2d 221, 226 (Tex. Crim. App. 1974) (rejecting claim that voluntariness-of-confession instruction had to be applied to specific claim of coercion by police to put defendant in jail; general instruction was sufficient). Other instructions, like the law of parties, which must be applied to the facts, do so generically rather than by specific reference to the evidence in the case. *See, e.g., Vasquez v. State*, 389 S.W.3d 361, 367 (Tex. Crim. App. 2012) (an application paragraph that incorporated the law of parties by stating that the defendant "either acting alone or as a party, as that term has been defined," sufficiently applied the law of parties to the facts of the case).

[77] *Brown*, 122 S.W.3d at 801.

[78] *Compare* 14 RR 16-17, 24-25 (defense argument) *with* 14 RR 35, 37-38, 40-41, 48-49, 65-69 (State's argument).

Moreover, *Simpkins* never passed on the appropriateness of this description of the evidence in a charge. When it stated, "[t]he trial court has correctly stated the law as found in [the voluntary-act statute]," it was answering Simpkins's complaint that the charge told jurors how to decide the voluntariness issue only in reference to a lack of intent when there are "various culpable mental states in the Penal Code."[79] This was necessarily a reference to the instruction "Conduct is not rendered involuntary merely because the person did not intend the results of his conduct."[80] The court of appeals erred in reading *Simpkins* as approval for including specific facts about accidental discharge and a struggle for possession of the gun.

The specificity the court of appeals requires has the wrong focus.

Even if specifics were appropriate, the court of appeals's requirement of specificity has the wrong focus. It is one thing to ask the jury to acquit if they believe the defendant committed the crime while unconscious. But when the issue is whether

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[79] *Simpkins*, 590 S.W.2d at 135.

[80] This instruction was included in the charge given to Appellant's jury. CR 358. It is frequently given or requested. *See, e.g.*, *Farmer*, 411 S.W.3d at 904; *Brown*, 955 S.W.2d at 279; *Joiner v. State*, 727 S.W.2d 534, 536 n.1 (Tex. Crim. App. 1987); *Carter v. State*, 717 S.W.2d 60, 78 (Tex. Crim. App. 1986). Despite *Simpkins*'s holding to the contrary, this Court would probably find it an improper comment on the weight of the evidence today.

the defendant's conduct *includes* a voluntary act, any specificity in the charge should be about whether the defendant committed such qualifying acts, not whether some later acts might be involuntary. Under the facts of *Simpkins*, acquittal would be appropriate if the jury believed Simpkins's only voluntary act was in retrieving the shotgun from the backseat, but not if it believed he also approached the victim with the gun and aimed it at him. If a rational jury in this case could decide that Appellant's conduct in drawing the gun and pointing it at the dealer's neck was not "included" within the conduct that matters for criminal responsibility, any focus on facts in the jury instructions should be directed to that conduct. The court of appeals erred to require a focus on evidence that the dealer pulled on the gun since that is not what decides the voluntariness issue.[81]

Instructing that voluntariness and mental state are distinct would also be an improper comment on the weight of the evidence.

The court of appeals also erred in insisting on an instruction that voluntariness and culpable mental state are distinct. Such an instruction is clearly not statutory.

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[81] *See Madden*, 242 S.W.3d at 510 (requiring disputed fact to be material to a violation of law).

Under the framework established in *Walters v. State*,[82] it is an impermissible comment because it is already adequately covered by a charge that requires the jury to find both culpable mental state and voluntary conduct. Thus, it will be obvious from the context of the charge that the concepts are distinct. Spelling this out for the jury would only give it unnecessary emphasis.[83]

ISSUE 4

> Alternatively, does an instruction result in some harm to the defense if it fails to include this specificity and apply it to lesser-included offenses never reached by the jury?

The court of appeals's harm analysis failed to recognize that any lack of specificity in the voluntariness instruction would have benefitted Appellant. The instruction given tracked the statutory language in § 6.01(a) and told the jury that they could acquit Appellant if they believed "the shooting" was not Appellant's voluntary act or conduct. The jury was never instructed in the charge that only a single voluntary act was required or that drawing and pointing the gun could suffice. No one explained this in closing argument. Without any knowledge of the applicable

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[82] 247 S.W.3d 204, 212 (Tex. Crim. App. 2007).

[83] *Beltran de la Torre*, 583 S.W.3d at 617.

law, the jury may well have understood the instruction as the court of appeals did—that Appellant's every movement had to be a product of his own voluntary choice. Greater specificity would have clarified the law to Appellant's detriment and made acquittal even less likely.

Also, failing to apply voluntariness to the lessers could not have resulted in some harm since the jury never rendered a verdict on those offenses.[84] Even if it had been applied, the jury could not have rationally found these offenses involuntary since even Appellant acknowledged he purposefully committed the relevant conduct (pointing the gun and wrestling over it).

In the end, nothing about the voluntariness instruction would have mattered. The jury concluded that Appellant shot at the victim intending to cause him serious bodily injury or death. For laypersons, this conclusion is incompatible with believing that Appellant's bodily movements were the nonvolitional acts of his victim. And even though the instruction that was given plainly provided Appellant another vehicle for the jury to acquit him, the defense never once referred to it in closing,

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[84] *See Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991), *overruled on other grounds by Fuller v. State*, 829 S.W.2d 191 (Tex. Crim. App. 1992) (any error in failing to submit a lesser was harmless where jury never entered a verdict on that count).

suggesting it was not a major part of the defensive strategy.[85] The jury rejected acquitting Appellant under the instructions they were given, and they would have done so regardless of how it was phrased and even if it were applied to the lessers.

[85] 14 RR 15, 19 ("The issue in this case is whether the State of Texas proved their case beyond a reasonable doubt. Did [Appellant] intentionally or knowingly cause Austin Hawkins' death or did he intent to cause serious bodily injury to Austin Hawkins when he was shot and that caused his death?").

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals reverse the judgment of the court of appeals and affirm the conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 6,405 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 7th day of April 2020, the State's Brief on the Merits was served electronically on the parties below.

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